Office Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ANTONIO RAMOS,

Petitioner,

vs.

VIRGINIA RAMOS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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46 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's right to due process was violated when the state trial court failed to exercise its discretion and held him in civil contempt as the means of enforcing a money judgment for a past due lump sum maintenance payment.

2. Whether petitioner's right to due process was violated when the state trial court imposed civil contempt without finding that his failure to pay a money judgment for past due lump sum maintenance was wilful and contumacious.

3. Whether petitioner's right to due process was violated when the state trial court failed to base the purging provision of its civil contempt order upon petitioner's ability to pay and chose, instead, a wholly arbitrary amount which he was required to pay to purge the contempt.

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In The

Supreme Court of the United States

October Term, 1984

ANTONIO RAMOS,

Petitioner,

vs.

VIRGINIA RAMOS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

OPINION BELOW

On June 15, 1984, the decision of the Illinois Appellate Court affirming the trial court's civil contempt order was entered. A copy of that decision is attached hereto as Appendix A. A Petition for Rehearing was filed in the Illinois Appellate Court which petition was denied on August 3, 1984. A copy of the order denying the Petition for Rehearing is attached hereto as Appendix B. A Petition for Leave to Appeal to the Illinois Supreme Court was filed, which petition was denied on December 21, 1984. A copy of the order denying the Petition for Leave to Appeal is attached hereto as Appendix C.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

ILL. REV. STAT. Ch. 40, § 502(e) (1979):

> Terms of the agreement set forth in the judgment are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

STATEMENT OF THE CASE

On June 9, 1980, a Judgment of Dissolution of Marriage was entered as to the parties Virginia A. Ramos ("Respondent") and Antonio Ramos ("Petitioner"). A Settlement Agreement entered into between the parties was incorporated as part of the judgment. On August 25, 1982, respondent filed a Petition for Rule to Show Cause alleging that petitioner had failed to abide by the terms of the settlement agreement. On January 27, 1983, a hear-

ing on the petition was held before the state trial judge. Petitioner was found in civil contempt of court. On March 14, 1983, the trial court denied petitioner's motion to reconsider and sentenced him to ninety days in jail. The court said that petitioner could purge himself of the contempt by payment of $125,000 within thirty days. A copy of that order is attached hereto as Appendix D.

STATEMENT OF THE FACTS

On May 7, 1980, Virginia A. Ramos [now Virginia Hawk] ("Respondent") filed a Petition for Dissolution of Marriage entitled, *In Re The Marriage Of: Virginia A. Ramos, Petitioner, and Antonio Ramos, Respondent*, in the Circuit Court of Cook County. (R. C2-C7) On June 9, 1980, Antonio Ramos ("Petitioner") filed an Answer to the Petition. (R. C24, C25) On October 7, 1980, Judge Robert Cusack entered a Judgment of Dissolution of Marriage. (R. C46) A settlement agreement entered into by the parties was incorporated as part of the judgment. (R. C30-C45)

The terms of the settlement agreement were negotiated and agreed upon by petitioner and respondent. (Divorce Transcript, p. 7) Although both parties were represented by counsel, the attorneys did not take an active role in negotiating the terms of the settlement agreement. (Divorce Transcript, p. 7) The settlement agreement provided that petitioner pay respondent a lump sum of one hundred seventy-five thousand dollars ($175,000) in lieu of alimony or periodic allowance. (R. C32) The money was to be paid within six months of the date of the settle-

ment and was to be a full and complete settlement of all claims asserted by petitioner against respondent for periodic allowance, support or maintenance, past, present and future. (R. C32)

The settlement was to be secured by petitioner's obtaining and maintaining a term life insurance policy in the amount of one hundred seventy-five thousand dollars on his life, with respondent as the beneficiary of this policy. (R. C32, C33) Petitioner procured the necessary insurance coverage. (R. C61, C62)

The settlement agreement provided that petitioner was to be liable for the outstanding debts incurred during the marriage including outstanding tax deficiencies owed to the Internal Revenue Service and the State of Illinois for the years 1978 and 1979. (R. C33) Petitioner was to provide child support of one thousand dollars per month for their one minor child and was to pay college expenses for all four children of the marriage. (R. C32, C33) The agreement also provided for the disposal of personal property and real estate acquired during the marriage. (R. C34-C38)

On August 25, 1982, respondent filed a petition for rule to show cause, alleging that petitioner wilfully had refused to pay her the $175,000 as required by the judgment. The petitioner further alleged that petitioner owed respondent $129,000 which had been confiscated from her by the Internal Revenue Service as payment of outstanding tax deficiencies. (R. C50-C54) Petitioner answered the petition alleging that his failure to pay in accordance with the judgment was the result of financial impossibility rather than a wilful refusal to comply with the terms of the judgment. (R. C55-C59)

On January 27, 1983, a hearing on the petition for rule to show cause was held before the state trial judge. At that hearing, both petitioner and respondent testified. Respondent attempted to establish that petitioner had the ability to pay the monies owed to her and wilfully failed to pay. Petitioner admitted that he had failed to pay the $175,000 and the income tax deficiency as the judgment provided, but maintained that he was incapable of so paying. Petitioner stated that he was willing to turn over all of his property to respondent, including his residence (R. 39) and jewelry which he valued at $100,000. (R. 39)

Petitioner's testimony further indicated that he substantially had complied with the terms of the judgment. He had turned over to respondent the marital home which she had sold for $900,000. (R. 27) In addition, he was paying $40,000 per year in college expenses for their four children. (R. 30) Further he had paid $50,000 on outstanding charge accounts from the marriage. (R. 31) Petitioner also had given respondent two Cadillacs and a Mercedes Benz. (R. 32) Finally, petitioner's property in Mexico had been turned over to his children. (R. 45)

The state trial court found the petitioner owed respondent the money as alleged in the petition for rule to show cause. (R. 52) The court inquired as to whether respondent wanted a judgment. (R. 51) Respondent's attorney responded that a judgment would not do any good and asked that the court enter sanctions for contempt. (R. 51) The court next asked whether respondent would accept petitioner's real estate as payment. Again respondent's attorney refused. (R. 52) The court then found petitioner in civil contempt. (R. 52)

The trial court never found petitioner to be in wilful contempt of court. The court stated that it appeared peti-

tioner had worked hard but did not have much money. (R. 52) The court then asked petitioner how long it would take him to raise the money. (R. 52) Later the court asked if petitioner could raise the money in three months. When petitioner informed the court that if he sold all of his property there would be nothing left, the court stated "Well, maybe. I don't know." (R. 53)

The court repeatedly informed petitioner that the court did not want to send him to jail. (R. 52, 53, 54) The court said, however, that if petitioner's ex-wife insisted, the court had no alternative but to sentence him to jail for nonpayment of the money. (R. 54) Apparently, the court misinterpreted the scope of its discretion and its duties under the statute. The case was continued for thirty days so that the parties could devise a settlement plan. (R. 54)

On February 28, 1983, petitioner filed a motion to reconsider. (R. 57) On that date the court reiterated that it did not wish to sent petitioner to jail. (R. 59) The case again was continued so that the parties could devise a payment plan. (R. 59)

On March 14, 1983, the court denied petitioner's motion to reconsider. (R. 65) The court sentenced him to ninety days in jail and stayed the mittimus for thirty days. (R. 65) The court said petitioner could purge himself of the contempt by payment of $125,000 within thirty days. (R. 66-67) He was unable to pay the $125,000. A Notice of Appeal timely was filed.

REASON FOR GRANTING THE WRIT

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE STATE TRIAL COURT FAILED TO EXERCISE ITS DISCRETION AND HELD HIM IN CIVIL CONTEMPT AS THE MEANS OF ENFORCING A MONEY JUDGMENT FOR A PAST DUE LUMP SUM MAINTENANCE PAYMENT, MADE NO FINDING THAT PETITIONER'S FAILURE TO PAY THAT JUDGMENT WAS WILFUL AND CONTUMACIOUS AND FAILED TO BASE THE PURGING PROVISION OF THE CONTEMPT ORDER UPON PETITIONER'S ABILITY TO PAY.

A. Petitioner's Right To Due Process Was Violated When The State Trial Court Failed To Exercise Its Discretion And Held Him In Civil Contempt As The Means Of Enforcing A Money Judgment For A Past Due Lump Sum Maintenance Payment.

Petitioner was found in civil contempt of court for failure to pay respondent $175,000 as a lump sum maintenance payment and $129,000 which was confiscated from respondent by the Internal Revenue Service for the tax years 1978 and 1979. (R. 52) It is petitioner's position that the trial court's use of its extreme power of contempt was inappropriate and unwarranted. Moreover, petitioner maintains that in utilizing its contempt power in this case the court failed to exercise the discretion with which it was empowered and thereby violated petitioner's right to due process.

The law in Illinois is clear that contempt proceedings are an appropriate method of enforcing the terms of divorce decrees. *Taapken v. Taapken*, 39 Ill.App.3d 785, 530 N.E.2d 794 (1976). In determining the propriety of orders in enforcement proceedings, however, it is necessary that

each case be viewed in the light of its own particular facts. *Wick v. Wick*, 19 Ill.2d 457, 167 N.E.2d 207 (1960).

The case at bar is atypical of most cases in which defendants are found in contempt for nonpayment of both child support and spousal maintenance. In this case, respondent sought to enforce, through contempt proceedings, the payment of a money judgment solely for a past due, lump sum maintenance payment.

The impropriety of the use of the contempt remedy to enforce a past due lump sum maintenance payment may be seen by examining the use of contempt in connection with delinquent child support payments. Contempt proceedings have been held an appropriate method by which to enforce child support payments. The majority rule, however, holds that contempt is *not* the proper remedy by which to enforce the payment of accrued support arrearages when, at the time the action is brought, the children have reached majority.[1]

The rationale behind the majority rule is that the court's jurisdiction to enforce support money judgments by the extraordinary remedy of contempt is predicated upon the continued dependence of the children and the need to insure support for the children during their minority; when a child reaches majority, therefore, the purpose for this extreme remedy terminates. *Fox v. Fox*, 56 Ill.App.3d

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[1] *Roberts v. Roberts*, 385 So.2d 1032 (Fla.App 1980); *Hampton v. Hampton*, 303 Minn. 500, 229 N.W.2d 139 (1975); *Phelps v. Phelps*, 85 N.M. 62, 509 P.2d 254 (1973); *Dawson v. Dawson*, 71 Wash.2d 66, 426 P.2d 614 (1967); *Zieman v. Zieman*, 265 Minn. 190, 121 N.W.2d 77 (1963); *Corbridge v. Corbridge*, 230 Ind. 201, 102 N.E.2d 764 (1952); *Halmo v. Halmo*, 247 Wis. 124, 19 N.W.2d 317 (1945); *Lowry v. Lowry*, 189 Okla. 650, 118 P.2d 1015 (1941). *See also* 32 ALR 3d 85 (1967).

446, 371 N.E.2d 1254, 1255 (1978).[2] In the situation where the children have reached majority, the deficiency in child support payments amounts to a money judgment which may be enforced through ordinary remedies.[3] The use of contempt is not favored because the power of contempt is viewed as a harsh and extreme sanction to which should be resorted only when there is no other reasonable means to enforce the judgment and then not in the first instance. *Fox*, 371 N.E.2d at 1255. This use of contempt as a remedy of last resort is especially applicable when it concerns the payment of a money judgment. *Id.*

In *Fox*, the plaintiff established that she was entitled to a money judgment for past due child support payments. Because she no longer needed the money to insure support of the children, who had reached majority, the court held that the extraordinary remedy of contempt was unwarranted. This was so even though the plaintiff probably expended her own funds to support the children during the majority.

Applying the rationale of the majority rule which finds inappropriate the use of the extreme contempt sanction to enforce past due child support payments once children have reached their majority to the present situation demonstrates that utilizing the contempt power to enforce a past due, lump sum maintenance payment is equally inappropriate.

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[2] In *Fox v. Fox*, Illinois adopted the majority rule that contempt is not the proper remedy by which to enforce the payment of accrued child support arrearages when at the time the action is brought the children have reached majority.

[3] Even though the children reach majority, the custodian of the children does not lose the right to collect the past due child support payments as they are vested rights. *Fox*, 371 N.E.2d at 1255.

In *Fox*, for example, the court explained that the use of the extraordinary contempt remedy to enforce child support payments was predicated upon the continued dependency of the children during their minority. 371 N.E.2d 1255. In that situation, the State's strong public policy interest in the support of minor children justified the extreme enforcement method of contempt. Thus, as the *Fox* court held, when the child reaches majority the State's strong interest abates and the purpose and justification for the extreme remedy of contempt terminates. *Id.*

Just as the children in *Fox* no longer were dependent upon the support payments, respondent here was not dependent upon the payment of the amount due her under the divorce judgment. And just as there was no strong public policy requiring the contempt sanction to spur repayment in *Fox*, neither is there in the present case. Respondent is financially affluent and certainly not in danger of becoming a ward of the State.[4]

The facts of this case further reveal that in utilizing the inappropriate remedy of contempt, the trial court failed to exercise the discretion with which it was empowered. As will be demonstrated below, the court did not choose

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[4] Respondent has remarried. (R. 24) In accordance with the terms of the divorce judgment, she was given the marital home valued at $900,000. (R. 27-28) In addition, she received the household furniture from the marital home as well as antiques and jewelry. (R. 28) She also received two Cadillac automobiles and a Mercedes Benz automobile for each of which there was no money owing. (R. 32) Petitioner settled all outstanding credit obligations which totaled over $50,000. (R. 31) Further, petitioner pays the college expenses of the children which amount to $40,000 annually. (R. 30) Petitioner secured his indebtedness to petitioner by procuring two term life insurance policies in the amounts of $175,000 and $129,000 naming petitioner as beneficiary.

to hold petitioner in contempt based upon a finding that, in its discretion, that remedy was most appropriate. Rather, the court imposed contempt because it felt it had "no choice". By this action, the court abdicated its responsibility to use discretion in imposing the most appropriate remedy. By the court's failure to exercise its discretion, petitioner's due process rights were violated.

That a trial court's failure to exercise discretion may work a violation of due process was recognized by this Court in *Stein v. New York*, 346 U.S. 156 (1953). In *Stein*, the defendants challenged, *inter alia*, the constitutionality of the procedure adopted by New York for excluding coerced confessions. That procedure required the trial judge to make a preliminary finding as to admissibility but did not permit him to make a final determination that a confession was admissible where the voluntariness issue presented a fair question of fact. The defendants' due process attack on the New York procedure was that the defendants could not take the witness stand to support, with their own oaths, their charges of coercion of the confessions without becoming subject to general cross examination. In rejecting the defendants' claim for failure to request that their cross examination be limited, the Court stated "[A]ppellate courts leave an exceptional discretion to trial courts to prevent abuse and injustice." 346 U.S. at 174-175. Such a statement, of course, presupposes that the trial court is bound to exercise its discretion. In *Stein*, the defendants' claim was rejected because they "took no step which would call for or permit an exercise of such discretion." *Id.* Nonetheless, the court recognized that in certain circumstances the trial court's failure to exercise that exceptional discretion with which it was empowered could work a violation of due process. *See* 346 U.S. at 174 ("It is not impossible that cross examination

could be employed to work a denial of due process."); 346 U.S. at 175 (Defendants raised a 14th Amendment claim, but not entitled to prevail.)

The record in the present case demonstrates that the trial court imposed contempt not as an affirmative exercise of its discretion but as an abandonment of its discretion when respondent requested the contempt sanction and refused to accept any other remedy. Specifically, respondent repeatedly refused the more appropriate remedy of a money judgment to enforce her claim against petitioner.

At the close of the hearing on respondent's rule to show cause, the trial court asked if respondent wanted a judgment:

> The Court: Is there any questions? Would you want a judgment for the 100 . . .

(R. 51) Respondent's counsel interrupted the court, protesting:

> Mr. Blum: No. This man had a cash flow. That judgment will do me not one bit of good. Based upon the evidence he had an ability to pay, your Honor. And I am asking that the court enter sanctions in accordance with the return of the rule.

(R. 51) The Court next inquired as to whether respondent would accept petitioner's real estate and again respondent's counsel protested:

> The Court: Will you take all of the real estate?
>
> Mr. Blum: No, your Honor. I want the $175,000. The $129,000 in accordance with the terms of the judgment.

(R. 52)

The trial court's comments indicate that it was seeking an alternative to the extreme remedy of contempt. However, the trial court apparently felt that it had no discretion but to impose contempt sanctions if that was what respondent demanded:

> The Court: . . . I have a job to do and I can't say, well, he is a doctor and I feel sorry for him and he gave his wife all of this money and he gave her two Cadillacs and a Mercedes Benz and gave her a $900,000 [home]. He signed it, the decree was entered. What can I do, Counsel. I want to be fair.
> . . .
> The Court: No. I am not joking. I don't like to do these things. But if your wife insists—or your former wife insists that you go to jail, *I have no choice*. . . .

(R. 53-54; Emphasis supplied)

Contrary to the trial court's analysis, however, the court did have "a choice" as to what remedy to apply. Section 502(e) of the Marriage and Dissolution of Marriage Act ("the Act")[5] provided respondent with a wide range of remedies as the appellate court noted. (Appendix A, pp. 8-9) As provided by Section 502(e) of the Act, it was within the court's discretion to impose alternative remedies. There is nothing in Section 502(e) which indicates that a contempt order is mandated when a person is found in wilful contempt.[6]

Although the appellate court found that the trial court would have abused its discretion if it refused to enforce

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[5] Section 502(e) provides:

> Terms of the agreement set forth in the judgment are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

[6] As will be discussed below, respondent does not concede that there was a finding of wilful contempt.

the judgment through contempt sanctions, no authority was cited for this position. Contrary to the appellate court's implication, there should be little dispute that respondent did not and should not have the prerogative to determine how and when the trial court should have resorted to the use of its contempt power.

Thus, when the trial court entered the contempt order at respondent's insistence because it felt it had "no choice", the court erroneously failed to exercise the discretion with which it was empowered. Because, as discussed above, a trial court's failure to exercise discretion works a due process violation, petitioner was denied due process when the trial court imposed the inappropriate remedy of contempt to induce payment of the lump sum maintenance payment instead of giving respondent a money judgment which she could seek to enforce.

B. Petitioner's Right To Due Process Was Violated When The State Trial Court Imposed Civil Contempt Without Finding That His Failure To Pay A Money Judgment For Past Due, Lump Sum Maintenance Was Wilful And Contumacious.

The state trial court found petitioner in civil contempt of court and sentenced him to ninety days in prison. He was given thirty days to purge himself of the contempt by paying respondent $125,000. (R. 66-67) In imposing the contempt sanction, however, the court made no finding that petitioner's failure to pay was wilful or contumacious. Accordingly, petitioner was denied his right to due process.

In civil contempt proceedings, the act of disobedience consists solely "in refusing to do what had been ordered." *Shillitani v. United States*, 384 U.S. 364, 368 (1966) citing

Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 449 (1911). Conditional imprisonment may be imposed to coerce obedience, rather than punish. 384 U.S. at 370. As a result of the justification of coercive imprisonment as applied to civil contempt, the contemnor must be able to comply with the court's order. 384 U.S. at 371. It is under this rationale, for example, that a contemnor imprisoned for failure to testify before a grand jury must be released when the term of the grand jury expires. Once the contumacious witness no longer has the ability to comply, the rationale for civil contempt vanishes. 384 U.S. at 371-372.

If confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether the alleged contemnor has in fact behaved in a manner that amounts to contempt. *McNeil v. Patuxent Institution Director*, 407 U.S. 245, 251 (1972). At such a hearing it should be ascertained whether the conduct subjecting the person to contempt is wilful. *Id.* In the absence of wilful conduct, there is no justification for confining a person on a theory of civil contempt. *Id.*

Applying this Court's guidelines set forth above to the present case establishes that before a person may be sentenced to imprisonment for nonpayment of support or maintenance, there must be a specific finding that the failure to pay was a wilful and contumacious refusal to obey the court's order.[7] No such finding in the present case was made.

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[7] This, of course, is the law in Illinois. *E.g., Mattioda v. Mattioda*, 101 Ill.App.2d 475, 243 N.E.2d 495 (1968); *White v. Adolph*, 305 Ill.App. 76, 26 N.E.2d 993 (1940) wherein civil contempt orders for failure to pay support payments and alimony were reversed where no finding of wilfulness was made.

In the case at bar, the trial court signed an order which stated that petitioner was in wilful contempt of court. (R. C140) The order, however, did not accurately reflect the findings of the court and was not supported by the record.[8] As a result, the sentence of imprisonment was improper.

The appellate court concluded that the trial court understood the meaning of the term wilful contempt and knew what the evidence had to show to sustain such a finding. Further, the appellate court noted that there was evidence from which the trial court could have found that petitioner had assets of a value in excess of 20 million dollars. (Appendix A, pp. 9-10) While, as the appellate court noted, the evidence may have supported a finding of wilful contempt the record clearly indicates that the trial court was unclear as to whether petitioner's failure to pay was wilful.

After a lengthy hearing in which both petitioner and respondent testified, the court found petitioner in contempt. The court ruled the evidence established that respondent was owed the money claimed. As the following colloquy demonstrates, however, there was no finding by the court that petitioner's failure to pay was wilful and contumacious:

> The Court: Well, there is no doubt that you have established on the record that he owes the money.
>
> Mr. Blum [Petitioner's Attorney]: And has an ability to pay.

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[8] As Mr. Justice Frankfurter said in *Sacher v. United States*, 343 U.S. 1, 32 (1952) (dissenting), "If we are to understand the circumstances in which the sentence under review [was] imposed, a close study of the record cannot be avoided."

> The Court: I will have to find him in contempt of court. (R. 52)

While respondent's attorney may have felt petitioner had an ability to pay, the trial court never made such a finding. To the contrary, the record indicates that the trial court was unclear as to his ability to pay:

> The Court: There will be a finding of contempt. How much time do you need to pay that, Doctor?
>
> Step forward, Doctor. Doctor I don't know. You have your professional lawyers. From what I can see here you have worked hard and you have accummulated a lot of money and you don't have much money.
>
> * * *
>
> The Court: Can you raise this money in the next three months? You have to sell everything. It is your problem. I don't want to send you to jail.
>
> The Witness [Petitioner]: Well if I sell all of my property and the priority will be the loan payments. There will be nothing left.
>
> The Court: Well, maybe. I don't know. (R. 52-53)

The trial court's inquiry as to whether petitioner could raise the money and its statement telling him to sell everything shows that the court was not convinced that he had an ability to pay the amount due. When he told the court that after selling his property there would be nothing left, the court replied: "Well, maybe. I don't know." This dialogue demonstrates, contrary to the appellate court's holding, that the trial court had not found from the evidence that petitioner's failure to pay was wilful and contumacious. In the absence of such a finding, as discussed above, the trial court could not sentence petitioner to jail. Thus, because the court failed to find that petitioner's failure to pay was wilful, the jail sentence should be vacated.

C. Whether Petitioner's Right To Due Process Was Violated When The State Trial Court Failed To Base The Purging Provision Of Its Civil Contempt Order Upon His Ability To Pay And Chose, Instead, A Wholly Arbitrary Amount Which He Was Required To Pay To Purge The Contempt.

Petitioner was given thirty days to purge himself of the civil contempt by paying respondent $125,000. The amount to be paid by a person to purge himself of civil contempt is an essential element of a contempt order. Moreover, because civil contemnors must "carry 'the keys of their prison in their own pockets.' " *Shillitani v. United States*, 384 U.S. 364, 368 (1966) citing *In re Nevitt*, 117 F.2d 448, 461 (8th Cir. 1902), the purging provision must be based upon the ability to pay.[9]

Similarly, to comport with the requirements of due process, the amount imposed by which the civil contempt may be purged cannot be arbitrary. As this Court said in *Cooke v. United States*, 267 U.S. 517, "The power of contempt . . . is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions."[10] Moreover, in this regard, Mr. Justice Frankfurter's words in *Sacher v. United States*, 343 U.S. 1, 41 (dissenting), bear consideration: "Public respect for the judiciary is best enhanced by . . . discouraging an assertion of power which is not restricted by the usual demands of due process."

In the present case, the purging provision of a $125,000 lump sum payment was not based upon evidence pre-

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[9] Illinois follows this rule. *Sullivan v. Sullivan*, 16 Ill.App.3d 549, 306 N.E.2d 604 (1973); *White v. Adolph*, 305 Ill.App. 76, 26 N.E.2d 993 (1940).

[10] Although *Cooke* referred to criminal contempt, the same considerations decrying arbitrariness prevail with civil contempt.

sented to the court concerning petitioner's ability to pay. In fact, there was no rational basis for the trial court's purging provision of $125,000. Accordingly, petitioner was denied his right to due process.

On March 14, 1983, the trial court sentenced petitioner to jail. (R. 67) On that date no evidence was presented to the court. At the contempt hearing no evidence was presented as to how or when petitioner could pay the amount due. In fact, as discussed above, the trial court was unclear as to whether he had the ability to pay the arrearage at all. Specifically, no evidence was presented from which the court could expect petitioner had the ability to make a lump sum payment of $125,000 to purge himself of contempt.

Moreover, there was no basis at all for the trial court to set the purging provision at $125,000. The amount owed was in excess of $300,000. The figure of $125,000 was wholly arbitrary. It had no relationship to petitioner's ability to pay. While the amount due the claimant is not the test, $125,000 did not even have any relationship to the amount due respondent.

The appellate court found the purging provision valid because petitioner was afforded several months to produce a repayment plan. (Appendix A, pp. 13-14) This finding, however, failed to address the question of whether petitioner had a present ability to pay $125,000 when the contempt order was entered as the law requires. The appellate court cited no evidence (because there was none) to indicate that petitioner had a present ability to pay $125,000 to remain free from custody. In the absence of concrete evidence that he had a present ability to pay $125,000, the appellate court incorrectly focused on petitioner's conduct rather than his ability to pay. Because

the purging provision was not based upon the evidence, petitioner's ability to pay, or any other rational basis, the purging provision of the contempt order violated petitioner's right to due process.

CONCLUSION

For each of the reasons set forth above, either independently or in combination, Antonio Ramos urges that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion Of The Appellate Court Of Illinois
First District, Fifth Division
No. 83-0890 — Filed June 15, 1984

IN RE THE MARRIAGE OF:
VIRGINIA RAMOS,

Petitioner-Appellee,

and

ANTONIO RAMOS,

Respondent-Appellant.

Appeal from the Circuit Court of Cook County, Illinois.
Honorable **Henry A. Gentile,** Judge Presiding.

JUSTICE SULLIVAN delivered the opinion of the court:

This appeal is from an order of the trial court finding respondent in willful contempt for failure to pay petitioner amounts admittedly due to her pursuant to the parties' settlement agreement incorporated in a judgment of dissolution of marriage. Respondent contends that: (1) the provisions in question were not enforceable through contempt proceedings; and (2) the order is improper because (a) the trial court did not find that his failure to pay was willful and contumacious; and (b) the provision thereof that he could purge himself of contempt by paying $125,000 to petitioner was not based upon his ability to pay.

A judgment of dissolution of the parties' marriage was entered on October 7, 1980, and incorporated therein are the terms of their settlement agreement, which were approved by the trial court. Pursuant thereto, petitioner was awarded the marital home and furnishings therein; three automobiles; and items of personal property. Respondent was awarded his medical practice; sole ownership of the parties' interest in three buildings, one of which housed his medical practice; an automobile; his personal effects; and any income generated during his lifetime from property owned by the parties in Mexico, with title thereto to be held in trust for the benefit of respondent's children. In addition, respondent agreed to pay outstanding debts incurred during the marriage, including any tax deficiencies for the years 1978, 1979, and 1980, and to "indemnify and hold [petitioner] harmless from any liability therefrom." For her part, petitioner agreed to pay, out of the proceeds of sale, the outstanding $46,000 mortgage on the marital home, as well as a $70,000 note secured by an assignment of the beneficial interest therein, but respondent was to pay her $35,000 within three years as his portion of the liability on the note. The parties further agreed that petitioner would have custody of their minor child; that respondent would pay her $1,000 per month as support until that child reached the age of 18; and that respondent would pay college expenses for their four children. Finally, with regard to maintenance, the agreement provided:

> "On or before six months from the effective date of this agreement, [respondent] shall pay to [petitioner] the sum of [$175,000] without interest, as a lump sum settlement in lieu of alimony or periodic allowance * * *."

The payment was to be "in full and complete settlement of all claims or rights held or asserted by [petitioner] for

periodic allowance, support or maintenance past, present and future * * *." The judgment of dissolution also provided that the terms of the settlement agreement would be binding on the parties "as an order of Court," and that the court retained jurisdiction of the parties and of the subject matter until such time as the judgment was fully satisfied.

On August 25, 1982, petitioner filed a petition for rule to show cause why respondent should not be held in contempt, alleging that he had willfully failed to pay her the $175,000 due under the agreement as a lump-sum maintenance award; that the Internal Revenue Service had seized $129,000 of her assets as payment of outstanding tax deficiencies; and that respondent had willfully refused to reimburse her for that amount, in violation of his agreement to indemnify her therefor. In his answer, respondent admitted that the sums were due to petitioner and had not been paid, but denied that his failure to do so was willful, asserting that he lacked the financial ability to pay.

The rule was entered and, after several continuances, a hearing was held on January 27, 1983, at which respondent, testifying as an adverse witness, acknowledged that he was familiar with the terms of the settlement agreement, which had been drafted by his attorney in accordance with details that he and petitioner had decided upon; that he had not paid petitioner the $175,000 due thereunder; and that, although he was aware that petitioner's account had been garnished in the amount of $129,000 for outstanding tax deficiencies, he had not reimbursed her therefor as required by their agreement. Respondent further stated that he was a surgeon, had practiced medicine since 1959, and had gross income of approximately $300,000 per year. He also identified a

financial statement, prepared in February of 1982 and submitted to Pioneer Bank, which listed assets slightly in excess of $20 million in addition to his income and $10,000 in cash, but denied that the statement was accurate, despite his signature thereon attesting that the information was correct. Respondent further admitted the accuracy of a record of his checking account showing transactions between March of 1981 and October of 1982. That record revealed that deposits were made totaling $790,900 including a $232,000 deposit in March of 1982. Respondent next testified that he purchased a $250,000 house late in 1980 or early 1981, paying $15,000 and financing the remainder; that, at the time of his remarriage in June of 1981, he purchased luggage for $7,000 and flew to Monaco for a honeymoon, although he insisted that the trip cost him only $600; that he purchased Tol-Tech Corporation, a medical corporation, in March of 1982 for $50,000, but asserted that he did not know the value of that company's receivables, and that the purchase was made in order to use the stock as collateral for a bank loan. He admitted that, in making the latter purchase, he used the name Alforrato rather than his own name, but alleged that he did so because he could no longer obtain credit in his own name. According to respondent, he had a friend named Alforrato living in Mexico, and that Alforrato gave him permission to use that name, but he further stated that he did not know whether Alforrato had any deposits or assets in this country which would establish his credit.

Later, testifying in his own behalf, respondent stated that he had complied with other provisions of the decree, including turning over the marital home and furnishings, as well as three automobiles, to petitioner; paying outstanding debts in the amount of $40,000 to $50,000; and paying college expenses of $40,000 per year for their

children. He also asserted that, at the time the settlement was entered into, he expected to receive a $200,000 tax refund for the years 1978 through 1980, which he planned to use to pay petitioner, but he later learned that he owed $250,000 in taxes. Respondent further testified that the checking account identified earlier was his business account, and that there was very little left of his income after disbursements were made therefrom; he did not know what his net profit was, but estimated that he had, at most, $700 left at the end of each month after paying expenses. With regard to the $232,000 deposit in March of 1982, respondent asserted that he was not sure where that money came from, but speculated that it was the proceeds of a loan necessary to pay amounts due to the Internal Revenue Service. Respondent next testified that his real estate had a total value of $450,000, not the $20 million reflected in the financial statement, and that all of the property was mortgaged to its full value; that one building, in which he had a one-half interest, was subject to two mortgages, but he did not know what the equity therein was; that another building he owned had a value of $45,000 to $50,000, but was subject to a $30,000 mortgage; that he was willing to turn over to petitioner all of his real estate and jewelry which he valued at $100,000 in exchange for a release; that he had borrowed $80,000 against the Tol-Tech stock in order to pay taxes; and that he owed $60,000 in taxes for 1981 and 1982.

On cross-examination, respondent acknowledged that the financial statement showed that the building in which he held a one-half interest had a value of $800,000, and was subject to a $100,000 mortgage. He further stated that he had no evidence of the amounts he claimed to have paid to the Internal Revenue Service, and admitted that, although he termed the checking account a "business" ac-

count, he paid personal expenses such as his mortgage and the children's college expenses therefrom.

The trial court found that respondent was in contempt of court, and, after several continuances, ordered that he be committed to the Cook County jail for 90 days, but stayed issuance of the mittimus for one month, stating that respondent could purge himself of contempt during that period by paying petitioner $125,000. Respondent's motion to reconsider was denied, and this appeal followed.

OPINION

Respondent first contends that contempt was not an appropriate remedy in the instant case, where the provision of the decree to be enforced provided for a lump-sum maintenance award. He acknowledges that section 502(e) of the Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1979, ch. 40, par. 502(e)) specifically provides that the terms of a settlement agreement which are set forth in a judgment "are enforceable by all remedies available for enforcement of a judgment, including contempt," but argues that, under certain circumstances, the trial court may not enforce a judgment through contempt proceedings, despite a finding that the failure to comply with the decree's provisions was willful.

In support of his position, respondent relies solely on *Fox v. Fox* (1978), 56 Ill. App. 3d 446, 371 N.E.2d 1254. There, the trial court had found the respondent in willful contempt for his failure to abide by provisions of the divorce decree regarding child support payments, and sentenced him to 90 days in jail with the proviso that he could purge himself of contempt by paying the petitioner $2,000. The fifth district reversed that order, adopting the rule followed by courts in other states that, where the

children for whose benefit the payments were to be made have reached the age of majority, contempt is not the proper means of enforcing payment of arrearages.

We need not decide here whether we agree with the fifth district's reasoning in *Fox*, for we note that it creates a very narrow exception to the general, long-standing rule, both legislative and judicial, that the terms of a divorce decree may be enforced through contempt proceedings. (See, *e.g.*, Ill. Rev. Stat. 1979, ch. 40, pars. 502(e), 505(b); *Shaffner v. Shaffner* (1904), 212 Ill. 492, 72 N.E. 447 (enforcement of periodic alimony provision); *In re Marriage of Arnold* (1984), 122 Ill. App. 3d 776, 462 N.E.2d 51 (enforcement of provision directing respondent to pay the parties' attorney's fees in a prior, unrelated matter); *Stevenson v. Stevenson* (1976), 40 Ill. App. 3d 10, 351 N.E.2d 238 (considering failure to comply with order that petitioner repay a debt and indemnify respondent therefor); *Taapken v. Taapken* (1976), 39 Ill. App. 3d 785, 350 N.E.2d 794 (enforcement of property settlement provisions); *Dobson v. Dobson* (1943), 320 Ill. App. 687, 51 N.E.2d 1010 (failure to make installment payments on lump-sum alimony award).) Here, we are not concerned with past-due child support payments where the children have reached the age of majority, but with maintenance and property settlement provisions, both of which are enforceable through contempt proceedings.

We are also unpersuaded by respondent's argument that contempt was not a proper means of enforcing the settlement agreement in the instant case because, as he asserts, petitioner is "financially affluent." Initially, we note that this argument was not raised in the trial court, and the evidence is insufficient to establish petitioner's financial situation. Moreover, our courts have ruled that the availability to the recipient spouse of alternative

means of support does not preclude enforcement of a maintenance award through contempt proceedings (*Shaffner v. Shaffner* (1904), 212 Ill. 492, 72 N.E. 447); thus, a contempt proceeding "is not concerned with the [petitioner's] ability to contribute to her own support" (*Shapiro v. Shapiro* (1969), 113 Ill. App. 2d 374, 388, 252 N.E.2d 93, 100).

Respondent has further argued that he must be granted a new hearing because the trial court "failed to exercise its discretion"; *i.e.*, it erroneously believed that, once it was established that respondent's failure to pay was willful, it had no alternative but to find him in contempt and impose sanctions therefor. It is respondent's position that the trial court had the power to enforce the judgment through other means, despite the finding that his failure to pay was willful, and could have denied petitioner access to this remedy. Specifically, respondent argues that the trial court could have entered judgment for the amount due, or could have required petitioner to accept his offer to turn over certain property to her in exchange for a release.

It is our view that the trial court was correct in its assessment. The Illinois Marriage and Dissolution of Marriage Act provides petitioner with a wide range of remedies (Ill. Rev. Stat. 1979, ch. 40, par. 502(e)); she chose to seek the simpler, more expeditious remedy of contempt proceedings rather than resorting to civil execution. It is immaterial that other means of enforcement were available (see *Dobson v. Dobson* (1943), 320 Ill. App. 687, 51 N.E.2d 1010); in fact, it appears that a petitioner may be entitled to pursue various remedies simultaneously (see *Shapiro v. Shapiro* (1969), 113 Ill. App. 2d 374, 252 N.E.2d 93). Furthermore, the trial court did not have the power to compel petitioner to accept a settlement offer

(*Taapken v. Taapken* (1976), 39 Ill. App. 3d 785, 350 N.E.2d 794). We believe that, having found that respondent was in willful contempt, the trial court would have abused its discretion if it refused to enforce the judgment through appropriate sanctions.

Respondent next contends that the order was improper because there was no finding that he was able to pay the amounts due. He admits that, in its written order, the court stated that he was in willful contempt, but argues that the order inaccurately reflects the trial court's findings, and that it is not supported by the record.

With regard to the first allegation, we note that numerous statements made by the trial court during the course of these proceedings establish that it understood the meaning of the term willful contempt, and knew what the evidence had to show in order to sustain such a finding. Respondent seeks to impeach the finding set forth in the order by quoting certain statements of the court made after it found him in contempt. However, we have read those remarks in context, as well as in the light of the record as a whole, and do not believe that, as respondent suggests, they indicate any doubt on the trial court's part that respondent's failure to pay was not willful. Instead, they were directed at ascertaining how long it would take respondent to convert assets into cash in order to satisfy the terms of the decree. The trial court did find that those assets were adequate, and its finding is amply supported by the evidence, since there was testimony from which the trial court could have concluded that those assets had a value in excess of $20 million. At the hearing, respondent denied that value, stating that his assets had a value of only $450,000, and that they were mortgaged to their full value. However, it is clear that the trial court did not accept this conclusory, self-serving statement, for it

admonished respondent's counsel: "You better get some better evidence than that if you want me to consider it, Counsel. You better give me specifics." No such specifics were provided, and respondent made no attempt to explain the alleged inaccuracy of this financial statement, which was prepared only a few months before the petition for rule to show cause was filed.

Turning to respondent's second argument on this issue, we note that the question whether failure to comply with a judgment was willful is one of fact (*Palacio v. Palacio* (1975), 33 Ill. App. 3d 1074, 339 N.E.2d 427), and the trial court's finding thereon will not be disturbed unless it is contrary to the manifest weight of the evidence. (*Taapken v. Taapken* (1976), 39 Ill. App. 3d 785, 350 N.E.2d 794.) Here, a *prima facie* showing of contempt was made through evidence that respondent failed to make payments required under the settlement agreement. (*Shapiro v. Shapiro* (1969), 113 Ill. App. 2d 374, 252 N.E.2d 93.) The burden then shifted to respondent to show that his failure to pay was not willful, but due entirely to his inability to pay (*Shaffner v. Shaffner* (1904), 212 Ill. 492, 72 N.E. 447), since "[i]t is not a contempt of court to fail to pay money which one neither has nor can obtain and which he has not causelessly either put out of his hands or failed to receive" (*White v. Adolph* (1940), 305 Ill. App. 76, 79, 26 N.E.2d 993, 994). However, financial inability to comply with an order must be shown by definite and explicit evidence (*First National Bank & Trust Co. of Evanston v. Desaro* (1963), 43 Ill. App. 2d 153, 193 N.E.2d 113), and that burden is not met by testimony of a general, indefinite nature with regard to financial status; "where it is sought to show that the failure to pay is due to inability, the party must show, with reasonable certainty, the amount of money he has received since the order was

made and that it has been disbursed in the payment of expenses which, under the law, he should pay before making any payment on the decree for alimony" (*Hengen v. Hengen* (1915), 271 Ill. 278, 284, 111 N.E. 121, 123).

We have already noted that the trial court could have found that respondent had assets valued at as much as $20 million; that evidence alone would support the finding that respondent's failure to pay was willful. In addition, however, it appears that $790,900 passed through his hands between March of 1981 and October of 1982. Respondent testified that a portion of it was used to pay his children's college expenses, taxes, and installments on loans. However, the amounts allegedly expended for these items do not account for even half of the monies admittedly received by him. With regard to the remainder, respondent stated merely that there was very little left after paying "expenses"; there is no evidence of what those expenses were.

In *Hengen v. Hengen* (1915), 271 Ill. 278, 111 N.E. 121, similar testimony was found inadequate to sustain the burden of proving inability to pay. There, the petitioner showed that the respondent owned a large amount of stock and real estate, and had received various sums of money, but had failed to comply with a court order to pay her alimony. In response, the former spouse admitted owning the stock and real estate, but asserted that the stock had little value or had been used as collateral, and that the real estate was encumbered. He further claimed that he was heavily indebted, and that, while he had received various amounts of money since entry of the divorce decree, he had used it to pay living expenses, office expenses, and interest. The supreme court upheld the finding of contempt, noting that his "showing of his property and the money received by him since the decree for

alimony and the manner in which the money was expended is of a most general character and wholly insufficient." 271 Ill. 278, 284, 111 N.E. 121, 123.

A similar result was reached in *Shaffner v. Shaffner* (1904), 212 Ill. 492, 72 N.E. 447, where the supreme court, in affirming an order finding that the respondent was in willful contempt for failure to pay alimony, stated:

> "He does not show what was done with this money except to say that it took it all to pay living and running expenses. This is not sufficiently definite. Estimates and guess-work will not answer. He who seeks to establish the fact that his failure to pay is the result of lack of funds must show with reasonable certainty the amount of money he has received. He must then show that that money has been disbursed in paying obligations and expenses which, under the law, he should pay before he makes any payment on the decree for alimony. It is proper that he first pay his bare living expenses, but whenever he has any money in his possession that belongs to him and which is not absolutely needed by him for the purpose of obtaining the mere necessaries of life, it is his duty to make a payment on this decree." (212 Ill. 492, 496, 72 N.E. 447, 449.)

We find these cases dispositive, and believe that respondent's testimony, like that in *Hengen* and *Shaffner*, was inadequate to sustain his burden of showing that he was financially unable to make the required payments. Under these circumstances, we cannot say that the finding of willful contempt was contrary to the manifest weight of the evidence.

Finally, respondent contends that the order must be reversed because the portion thereof which provides that he may purge himself of contempt by paying petitioner $125,000 is unsupported by any evidence that he has the present ability to pay that amount.

Where contempt proceedings are employed to compel compliance with a court order made for the benefit of the petitioning party, the sanction imposed is remedial or coercive in nature (*Melbourne Corp. v. City of Chicago* (1979), 76 Ill. App. 3d 595, 394 N.E.2d 1291), and the trial court therefore must specify how the respondent may purge himself of contempt (*Continental Illinois National Bank v. Brach* (1979), 71 Ill. App. 3d 789, 390 N.E.2d 373). Furthermore, where the sanction is imposed in order to compel compliance with an order to pay a specified amount of money, the purging provision must be based on the respondent's ability to pay. *Sullivan v. Sullivan* (1973), 16 Ill. App. 3d 549, 306 N.E.2d 604.

Respondent asserts that no evidence was presented to show how or when he could pay the amount due. However, the record establishes that this lack of evidence was due entirely to respondent's failure to comply with the trial court's repeated requests that he provide that information. Respondent was found in contempt on January 27, 1983, and the trial court on that date asked him how long it would take him to raise the money due, suggesting that a reasonable amount of time might be three months. Despite his assertion in his answer to the petition, filed more than five months earlier, that he would present a payment plan, respondent failed to offer a reasonable estimate of how long it would take him to raise the required amount. The trial court imposed no sanction at that time, but continued the matter for one month with instructions that respondent devise some plan for payment. On the next court date, February 28, 1983, no plan was presented, and the trial court granted a further continuance, directing respondent to present a plan for payment. On March 14, 1983, the parties were again before the court, and when respondent failed to present the re-

quested plan, the trial court entered the order in question, sentencing defendant to 90 days in jail but staying the mittimus for 30 days to enable respondent to purge himself of contempt by paying petitioner $125,000, noting that "[h]e has property all over here, and he has real estate, and he has a good practice."

The trial court, through the granting of numerous continuances, afforded respondent several months within which to convert his assets to cash, either through sale or other means. It clearly believed that this represented an adequate amount of time, and that respondent had sufficient assets to pay the entire amount due; nevertheless, the trial court repeatedly invited respondent to present some alternative plan. None was offered, and respondent, rather than presenting further evidence of what he could presently pay, chose to stand on his assertions at the January 27 hearing that he had no cash and no assets which could be converted to cash. The trial court rejected that contention and, as we have previously determined, its finding was not contrary to the manifest weight of the evidence. Moreover, there is nothing in this record which would indicate that three months was an inadequate period of time within which to convert some of respondent's substantial assets to cash. Therefore, we do not agree that the purging provision was not based on his ability to pay the amount designated.

For the foregoing reasons, the order of the trial court is affirmed.

AFFIRMED.

MEJDA, P.J., and LORENZ, J. concur.

APPENDIX B

Order Entered August 3, 1984

IN THE APPELLATE COURT
STATE OF ILLINOIS
FIRST DISTRICT

No. 83-890

IN RE THE MARRIAGE OF
VIRGINIA RAMOS,

Petitioner-Appellee,

v.

ANTONIO RAMOS,

Respondent-Appellant.

ORDER

Respondent-Appellant's petition for rehearing is denied.

/s/ James J. Mejda
Presiding Justice

/s/ Francis S. Lorenz
Justice

/s/ John J. Sullivan
Justice

APPENDIX C

Order Entered November 30, 1984

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield Illinois 62706
(217) 782-2035

November 30, 1984

Mr. Louis B. Garippo
Attorney at Law
100 W. Monroe St., 18th Flr.
Chicago, IL 60603

No. 60761—Virginia Ramos, respondent, v. Antonio Ramos, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on December 21, 1984.

APPENDIX D

Order Entered March 14, 1983

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

No. 80 D 9624

IN RE THE MARRIAGE OF:
VIRGINIA A. RAMOS,

Petitioner,

v.

ANTONIO RAMOS,

Respondent.

ORDER

THIS CAUSE coming on to be heard upon the Return of the Rule to Show Cause heretofore entered against the Respondent, ANTONIO RAMOS and other matters contained in the Petition of the Petitioner filed herein and the Answer thereto of the Respondent; the parties being present in open court and represented by their respective attorneys of record; the Court having heard the sworn testimony of the parties; due notice having been served; the court having jurisdiction and being advised in the premises and the court finding that the Respondent, ANTONIO RAMOS is in wilful contempt of court;

IT IS ORDERED:

1. That the Respondent Antonio Ramos shall be committed to the County Jail for 90 days for his contempt of Court, and the contempt mittimus is stayed until April 14, 1983 at 9:30 AM, without further notice.

2. That Respondent may purge himself of contempt by paying petitioner $125,000.00 prior to April 14, 1983.

3. That Respondent's motion for rehearing is denied.

ENTER:

/s/ Henry A. Gentile
Judge

March 14, 1983